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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CLARK WALKER,
Plaintiff,
v.
CONTRA COSTA COUNTY, et al.
Defendants.

NO. C03-3723 TEH
NO. C05-2800 TEH

ORDER ON DEFENDANTS'
MOTIONS IN LIMINE RE:
CONSENT DECREE

For the Northern District of California
Defendants moved to exclude evidence of the Consent Decree entered in Croskrey v.
Contra Costa County, United States District Court for the Northern District of California,
Case No. C 73 0906 CJS, of the meaning of the Consent Decree, and of defendant Richter's
statement or statements that he "d[oes] not hire by the Consent Decree." The Court heard
extensive oral argument on the motion on November 28, 2006 and November 29, 2006. For
the reasons set out below, the motion is DENIED, without prejudice to objections to specific
evidence, as set out below.

Since 1975, Contra Costa County has been subject to a consent decree entered in
Croskrey. In general terms, the goal of the consent decree is to ensure that "the percentage of
minorities and females employed in each job classification and each department in county
employment reflect the supply of qualified members of minority groups and females in the
work force in Contra Costa County." Consent Decree § II.A-1. The Consent Decree provides
procedures for identifying imbalances between percentage of County employees in protected

1 classes and the percentage of protected classes in the relevant work force. Id. §§ II.A-B. It
2 sets out procedures for setting goals and timetables to rectify such imbalances, and
3 procedures for reevaluating minimum qualifications under certain circumstances to ensure
4 that they are related to job performance. Id. It also provides for review of civil service
5 examinations and their results under certain circumstances. Id. § II.C. It requires the County
6 to recruit women and minorities. Id. § II.D. Finally, it creates mechanisms to administering
7 the decree and resolving disputes that might arise under it. Id. §§ II.E, F.

8 By its own terms, the Consent Decree does not require the County to hire any
9 particular employee. Section III provides:

10 Nothing in this Consent Decree shall require or be construed to require defendants to
11 hire, discharge, promote or demote any employee, to hire or maintain more employees
12 than are needed to perform the work available, to create any job classification, or to
continue in effect any work or job classification now being performed or in existence.

13 Plaintiff plans to introduce evidence that he was an ardent supporter of racial diversity
in the Department and of the Consent Decree. His position (and that of the Black
14 Firefighters Association ("BFA")) was that the Consent Decree imposed hiring and
recruitment requirements on the County. He believed Richter's plan to recruit and hire
paramedics laterally from other fire departments (which would result in an all-white entry
15 class) would violate the Consent Decree.

16 Walker's opposition to what he perceived as unfair hiring practices and violation of
the Consent Decree took several forms, including producing a press release with the BFA,
17 writing a letter to the local newspaper about the County's hiring practices, and meeting with
Richter in September 2001 about the hiring and discrimination issues. Walker has testified
18 that during this acrimonious meeting, when he argued that "the institutional bias of ignoring
diversity goals was against the spirit of the Croskrey Consent Decree," Richter responded he
19 "did not hire by the Consent Decree." Declaration of Clark Walker in Opposition to
Defendants' Motion for Summary Judgment or Partial Summary Judgment, Filed April 26,
20 2005, ¶ 57. Moreover, Walker proposes to introduce evidence that Richter refused to allow
21 the Croskrey Consent Decree Advisory Board, of which Walker was the Chair, use the fire
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1 district training facility for its meetings, and that Richter told others that Walker's advocacy
2 on Consent Decree issues had "created problems" for him and the fire district itself.

3 Defendants move to exclude all evidence relating to the Consent Decree, including
4 Richter's alleged statement that he "d[oes] not hire by the Consent Decree," on the ground it
5 is not evidence of racial animus, that it is irrelevant to Walker's claims, and that it is unfairly
6 prejudicial.

7 There is little question that the existence of the Consent Decree is relevant to, and
8 even essential to, Plaintiff's discrimination and retaliation claims. He argues that his vocal
9 support for racial diversity in the Department, his advocacy for what he believed were the
10 requirements of the Consent Decree, and his opposition to what he believed was unlawful
11 discrimination in the Department were inextricably intertwined. Together, they constituted
12 "protected activity" for which he suffered retaliation - whether or not he was correct about
13 the legal requirements that the Consent Decree imposed.¹ He claims Richter retaliated
14 against him for this protected activity by failing to select him for the Assistant Fire Chief
15 position in March 2003. Complaint, Case No. 03-3723, Third Cause of Action.

16 Advocacy for or against a consent decree can form the basis for a retaliation claim.
17 See, e.g., Hicks v. Arkansas Dept. of Health and Human Services, 2006 WL 2551367, *11
18 (E.D.Ark. 2006)(written complaint that alleged retaliation and referred to party's rights under
19 a consent decree can be a protected activity); Hall v. Alexander, 2002 WL 655317, *1
20 (M.D.Ala. 2002)(plaintiff claims he suffered retaliation for his opposition to a consent decree
21 that involved racial discrimination in hiring). Moreover, disputes between Richter, the
22 BFA, and Walker about the Consent Decree and its requirements form the context for
23 Walker's claims -- context which cannot be excised from the trial without hamstringing
24 Walker's ability to make his case.

25 ¹ Title VII forbids discrimination against employees who attempt to protest or correct
26 allegedly discriminatory employment practices. It is not necessary, however, that the
27 practice be demonstrably unlawful; opposition is "protected activity" whenever the
28 opposition is based on a "reasonable belief" that the employer has engaged in an unlawful
employment practice. E.E.O.C. v. Crown Zellerbach Corp. 720 F.2d 1008, 1013 (9th Cir.
1983), quoting Sias v. City Demonstration Agency, 588 F.2d 692, 695-96 (9th Cir.1978).

Richter's remark that he "d[oes not] hire by consent decree" may also be relevant evidence of discriminatory animus. Plaintiff argues that because the Consent Decree is designed to ensure equal employment opportunity for protected classes, the statement is evidence of bias, whether or not it controlled hiring decisions. Defendants argue the remark does not support an inference of racial bias because the Consent Decree does not, in fact, control hiring decisions. They argue that the comment would show racial bias only if it evinced an intent to flaunt a law or disobey a court order.

Although the consent decree does not by its terms govern specific hiring decisions, it does deal with hiring practices in general, so that Richter's remark could be construed as an expression of intent to ignore the Consent Decree. Moreover, a jury might conclude the statement is evidence of bias not because it shows Richter would be willing to violate governing laws or judicial imperatives, but because it shows hostility to what the Consent Decree stands for in a symbolic sense. As the Ninth Circuit noted when speaking of "code words" alleged to be evidence of discriminatory animus,

[A] reasonable jury could conclude that the intent to discriminate is implicit in these comments. There are no talismanic expressions which must be invoked as a condition-precedent to the application of laws designed to protect against discrimination. The words themselves are only relevant for what they reveal—the intent of the speaker. A reasonable jury could find that statements like the ones allegedly made in this case send a clear message and carry the distinct tone of racial motivations and implications. They could be seen as conveying the message that members of a particular race are disfavored and that members of that race are, therefore, not full and equal members of the workplace.

McGinest v. GTE Service Corp., 360 F.3d 1103, 1117 (9th Cir. 2004), quoting Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1083 (3d Cir. 1996); see also Johnson v. Hugo's Skateway, 974 F.2d 1408, 1413 (4th Cir. 1992)(failure to comply with consent decree can be evidence of discriminatory animus); Lyons v. England, 307 F.3d 1092, 1110 & n.12 (9th Cir. 2002)(derogatory or racial remarks outside the limitations period are admissible to show discriminatory intent).

The cold transcript of Richter's alleged statement is ambiguous: Richter could have been making a plain, nondiscriminatory assessment of his legal obligations relating to hiring; he could have been chafing under what he viewed as improper bureaucratic incursions on his

1 authority as Fire Chief; he could have been expressing hostility to equal employment
2 opportunity for protected classes, or anything in between. But if, as Plaintiff asserts, the
3 Consent Decree and its requirements had become a controversial, hot-button issue that
4 symbolized the parties' conflicts over alleged discrimination, affirmative action, and race, the
5 jury could construe the statement as evidence of discriminatory animus. The import of the
6 statement will depend in large part on context, tone, and credibility factors that must be
7 developed at trial.

8 Defendants argue that the remark should be excluded precisely because it is
9 ambiguous. The fact that the statement is ambiguous, however, does not inexorably lead to
10 the conclusion that it is unfairly prejudicial or confusing to the jury. Moreover, none of
11 Defendants' authority supports exclusion here. Tennison v. Circus Circus Enterprises, 244
12 F.3d 684, 689-90 (9th Cir. 2001) held only that evidence of acts which are remote in time
13 and relate to parties other than the plaintiff can be properly excluded. Similarly, Defendants'
14 Eighth Circuit authority suggests, at best, that a district court may properly exclude evidence
15 of discriminatory behavior or "stray remarks" by non-decisionmakers, or individuals other
16 than those whose conduct is at issue. See Spencer v. Stuart Hall Co., 173 F.3d 1124,
17 1130-1131 (8th Cir. 1999); Callahan v. Runyon, 75 F.3d 1293, 1298 & n.5 (8th Cir. 1996).

18 Plaintiff will be permitted to testify briefly about his understanding of the Consent
19 Decree. Richter will also be permitted to testify to his own understanding of the Consent
20 Decree to dispel any impression or suggestion that he was prepared to violate a court order.

21 The Court is well aware that evidence about the Consent Decree and Richter's remark
22 has the potential to lead to unfair prejudice and consume undue trial time. At oral argument
23 on November 28, 2006 – the first day of trial – counsel for Defendants conceded that
24 appropriate limiting instructions could eliminate much of the potential prejudice and
25 confusion set out in his moving papers.

26 The parties' apparent inability to fruitfully meet and confer, and to narrow the issues
27 presented to the Court, is not only a continuing source of frustration for the Court but an
28 unacceptable impediment to prompt resolution of evidentiary issues here. The Court invited

1 the parties to submit proposed limiting instructions and took the motion under submission
2 until such limiting instructions were submitted. The parties did not submit limiting
3 instructions before opening statements were to be given. On November 29, 2006, while the
4 jury sat waiting, counsel for Defendants again objected to any reference to the Consent
5 Decree. In an effort to give the parties sufficient guidance for opening argument, the Court
6 issued initial instructions it would give to the jury that reflected the contours of the Court's
7 tentative conclusions expressed during oral argument.

8 Defendants' counsel again objected to admission of evidence relating to the Consent
9 Decree. Pressed by the Court, counsel for the defendants argued for the first time about
10 specific testimony and evidence that should be excluded. Defendants' motions spoke
11 specifically only to Richter's comment and the Consent Decree itself, and argued in general
12 that all evidence relating to the Consent Decree should be excluded. Defendants had ample
13 time after the Court first conveyed its tentative inclination to allow evidence relating to the
14 Consent Decree on November 21, 2006, to develop specific arguments about how specific
15 evidence could be prejudicial. Such argument comes too late now for the Court to consider it
16 as part of the motions in limine.

17 Defendants will be required to raise objections to specific testimony and evidence as
18 the need arises. The Court will rule on the objections in context. Plaintiff is counseled to
19 bear in mind the limited purposes to which the Consent Decree can be used reflected in the
20 Court's comments at oral argument, in this Order, and the previous Order on motions in
21 limine. The parties are to submit proposed limiting instructions relating to the Consent
22 Decree by the start of trial on December 1, 2006.

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24 **IT IS SO ORDERED.**

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26 Dated: November 29, 2006


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28 THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT